

SENATE AMENDMENTS TO SENATE BILL 274

By COMMITTEE ON JUDICIARY

April 24

1 On page 1 of the printed bill, line 2, delete “and” and after “ORS” delete the rest of the line
2 and lines 3 through 6 and insert “183.605, 183.610, 183.630, 183.635, 183.650, 183.685 and 183.690; re-
3 pealing ORS 183.600; and declaring an emergency.”.

4 Delete lines 8 through 24 and delete pages 2 through 29 and insert:
5

“APPOINTMENT OF CHIEF ADMINISTRATIVE LAW JUDGE

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8 “**SECTION 1.** ORS 183.610 is amended to read:

9 “183.610. (1) The [*Director of the Employment Department*] **Governor** shall [*employ*] **appoint** a
10 person to serve as chief administrative law judge for the Office of Administrative Hearings. The
11 [*director*] **Governor** shall consider recommendations by the Office of Administrative Hearings
12 Oversight Committee in [*hiring*] **appointing** a chief administrative law judge. The person
13 [*employed*] **appointed** to serve as chief administrative law judge must be an active member of the
14 Oregon State Bar. The chief administrative law judge has all the powers necessary and convenient
15 to organize and manage the office. Subject to the State Personnel Relations Law, the chief admin-
16 istrative law judge shall employ all persons necessary for the administration of the office, prescribe
17 the duties of those employees and fix their compensation. The chief administrative law judge shall
18 serve for a term of four years. [*Notwithstanding ORS 236.140, the chief administrative law judge may*
19 *be removed during a term only for inefficiency, incompetence, neglect of duty, malfeasance in office,*
20 *unfitness to render effective service or failure to continue to meet the criteria for appointment.*] **The**
21 **chief administrative law judge serves at the pleasure of the Governor.**

22 “(2) The chief administrative law judge shall employ administrative law judges. The chief ad-
23 ministrative law judge shall ensure that administrative law judges employed for the office receive
24 all training necessary to meet the standards required under the program created under ORS 183.680.

25 “(3) The chief administrative law judge shall take all actions necessary to protect and ensure
26 the independence of each administrative law judge assigned from the office.

27 “**SECTION 2.** **The amendments to ORS 183.610 by section 1 of this 2009 Act do not affect**
28 **the term of the person currently serving as the chief administrative law judge on the effec-**
29 **tive date of this 2009 Act. Upon the completion of the term of that person, or the position**
30 **otherwise becoming vacant before the completion of the term, the Governor shall appoint a**
31 **person to serve as chief administrative law judge under ORS 183.610, as amended by section**
32 **1 of this 2009 Act.**

33 “**SECTION 3.** ORS 183.690 is amended to read:

34 “183.690. (1) The Office of Administrative Hearings Oversight Committee is created. The com-
35 mittee consists of nine members, as follows:

1 “(a) The President of the Senate and the Speaker of the House of Representatives shall appoint
2 four legislators to the committee. Two shall be Senators appointed by the President. Two shall be
3 Representatives appointed by the Speaker.

4 “(b) The Governor shall appoint two members to the committee. At least one of the members
5 appointed by the Governor shall be an active member of the Oregon State Bar with experience in
6 representing parties who are not agencies in contested case hearings.

7 “(c) The Attorney General shall appoint two members to the committee.

8 “(d) The chief administrative law judge for the Office of Administrative Hearings [*employed un-*
9 *der ORS 183.610*] shall serve as an ex officio member of the committee. The chief administrative law
10 judge may cast a vote on a matter before the committee if the votes of the other members are
11 equally divided on the matter.

12 “(2) The term of a legislative member of the committee shall be two years. If a person appointed
13 by the President of the Senate or by the Speaker of the House ceases to be a Senator or Represen-
14 tative during the person’s term on the committee, the person may continue to serve as a member
15 of the committee for the balance of the member’s term on the committee. The term of all other ap-
16 pointed members shall be four years. Appointed members of the committee may be reappointed. If
17 a vacancy occurs in one of the appointed positions for any reason during the term of membership,
18 the official who appointed the member to the vacated position shall appoint a new member to serve
19 the remainder of the term. An appointed member of the committee may be removed from the com-
20 mittee at any time by the official who appointed the member.

21 “(3)(a) The members of the committee shall select from among themselves a chairperson and a
22 vice chairperson.

23 “(b) The committee shall meet at such times and places as determined by the chairperson.

24 “(4) Legislative members shall be entitled to payment of per diem and expense reimbursement
25 under ORS 171.072, payable from funds appropriated to the Legislative Assembly.

26 “(5) The committee shall:

27 “(a) Study the operations of the Office of Administrative Hearings;

28 “(b) Make any recommendations to the Governor and the Legislative Assembly that the com-
29 mittee deems necessary to increase the effectiveness, fairness and efficiency of the operations of the
30 Office of Administrative Hearings;

31 “(c) Make any recommendations for additional legislation governing the operations of the Office
32 of Administrative Hearings; and

33 “(d) Conduct such other studies as necessary to accomplish the purposes of this subsection.

34 “(6) The Employment Department shall provide the committee with staff, subject to availability
35 of funding for that purpose.

36 “**SECTION 4. ORS 183.600 is repealed.**

37
38 “**EMPLOYMENT DEPARTMENT SERVICES**
39 **TO OFFICE OF ADMINISTRATIVE HEARINGS**

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41 “**SECTION 5.** ORS 183.605 is amended to read:

42 “183.605. (1) The Office of Administrative Hearings is established [*within the Employment De-*
43 *partment*]. The office shall be managed by the chief administrative law judge [*employed*] **appointed**
44 under ORS 183.610. The office shall make administrative law judges available to agencies under ORS
45 183.600 to 183.690. Administrative law judges assigned from the office under ORS 183.600 to 183.690

1 may:

2 “(a) Conduct contested case proceedings on behalf of agencies in the manner provided by ORS
3 183.600 to 183.690;

4 “(b) Perform such other services, as may be requested by an agency, that are appropriate for
5 the resolution of disputes arising out of the conduct of agency business; and

6 “(c) Perform such other duties as may be authorized under ORS 183.600 to 183.690.

7 “(2) All persons serving as administrative law judges in the office must meet the standards and
8 training requirements of ORS 183.680.

9 “(3) **The Employment Department shall provide administrative services to the Office of
10 Administrative Hearings, including budget services, accounting services, procurement ser-
11 vices, contracting services, human resources services and information technology services.
12 The services must be provided in a manner that is consistent with law, rules and state poli-
13 cies. The Office of Administrative Hearings shall reimburse the Employment Department for
14 the costs of the services provided.**

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“RULES OF PROCEDURE

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18 “**SECTION 6.** ORS 183.630 is amended to read:

19 “183.630. (1) Except as provided in subsection (2) of this section, all contested case hearings
20 conducted by administrative law judges assigned from the Office of Administrative Hearings must
21 be conducted pursuant to the model rules of procedure prepared by the Attorney General under ORS
22 183.341 if the hearing is subject to the procedural requirements for contested case proceedings.

23 “(2) The Attorney General, after consulting with the chief administrative law judge, may exempt
24 an agency or a category of cases from the requirements of subsection (1) of this section. The ex-
25 emption may be from all or part of the model rules adopted by the Attorney General. Any exemption
26 granted under this subsection must be made in writing.

27 “(3) **The Attorney General shall consult with an advisory group when adopting model
28 rules of procedure for the purpose of contested case hearings conducted by administrative
29 law judges assigned from the Office of Administrative Hearings. The advisory group shall
30 consist of:**

31 “(a) **The chief administrative law judge;**

32 “(b) **An officer or employee of a state agency, appointed by the Governor;**

33 “(c) **An attorney who practices administrative law, appointed by the Oregon State Bar;**

34 “(d) **A deputy or assistant attorney general appointed by the Attorney General; and**

35 “(e) **A public member, appointed by the Governor, who is not an attorney or an officer
36 or employee of a state agency.**

37 “[3] (4) Except as may be expressly granted by the agency to an administrative law judge as-
38 signed from the office, or as may be expressly provided for by law, an administrative law judge
39 conducting a hearing for an agency under ORS 183.600 to 183.690 may not authorize a party to take
40 a deposition that is to be paid for by the agency.

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“MODIFICATION OF ADMINISTRATIVE LAW JUDGE’S ORDER BY AGENCY

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45 “**SECTION 7.** ORS 183.650 is amended to read:

1 “183.650. (1) In any contested case hearing conducted by an administrative law judge assigned
2 from the Office of Administrative Hearings, the administrative law judge shall prepare and serve on
3 the agency and all parties to the hearing a form of order, including recommended findings of fact
4 and conclusions of law. The administrative law judge shall also prepare and serve a proposed order
5 in the manner provided by ORS 183.464 unless the agency or hearing is exempt from the require-
6 ments of ORS 183.464.

7 “(2) If the administrative law judge assigned from the office will not enter the final order in a
8 contested case proceeding, and the agency modifies the form of order issued by the administrative
9 law judge in any substantial manner, the agency must identify the modifications and provide an ex-
10 planation to the parties to the hearing as to why the agency made the modifications.

11 “(3) An agency conducting a contested case hearing may modify a finding of historical fact made
12 by the administrative law judge assigned from the Office of Administrative Hearings only if the
13 agency determines that [*the finding of historical fact made by the administrative law judge is not*
14 *supported by a preponderance of the evidence in the record*] **there is clear and convincing evidence**
15 **in the record that the finding was wrong.** For the purposes of this section, an administrative law
16 judge makes a finding of historical fact if the administrative law judge determines that an event did
17 or did not occur in the past or that a circumstance or status did or did not exist either before the
18 hearing or at the time of the hearing.

19 “(4) If a party seeks judicial review of an agency’s modification of a finding of historical fact
20 under subsection (3) of this section, the court shall make an independent finding of the fact in dis-
21 pute by conducting a review de novo of the record viewed as a whole. If the court decides that the
22 agency erred in modifying the finding of historical fact made by the administrative law judge, the
23 court shall remand the matter to the agency for entry of an order consistent with the court’s judg-
24 ment.

25 “**SECTION 8. The amendments to ORS 183.650 by section 7 of this 2009 Act apply only to**
26 **hearings for which an administrative law judge is assigned from the Office of Administrative**
27 **Hearings on or after the effective date of this 2009 Act.**

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29 **“EX PARTE COMMUNICATIONS**

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31 “**SECTION 9.** ORS 183.685 is amended to read:

32 “183.685. (1) An administrative law judge assigned from the Office of Administrative Hearings
33 who is presiding in a contested case proceeding and who receives an ex parte communication de-
34 scribed in subsections (3) and (4) of this section shall place in the record of the pending matter:

35 “(a) The name of each person from whom the administrative law judge received an ex parte
36 communication;

37 “(b) A copy of any ex parte written communication received by the administrative law judge;

38 “(c) A copy of any written response to the communication made by the administrative law judge;

39 “(d) A memorandum reflecting the substance of any ex parte oral communication made to the
40 administrative law judge; and

41 “(e) A memorandum reflecting the substance of any oral response made by the administrative
42 law judge to an ex parte oral communication.

43 “(2) Upon making a record of an ex parte communication under subsection (1) of this section,
44 an administrative law judge shall advise the agency and all parties in the proceeding that an ex
45 parte communication has been made a part of the record. The administrative law judge shall allow

1 the agency and parties an opportunity to respond to the ex parte communication.

2 “(3) Except as otherwise provided in this section, the provisions of this section apply to com-
3 munications that:

4 “(a) Relate to a legal or factual issue in a contested case proceeding;

5 “(b) Are made directly or indirectly to an administrative law judge while the proceeding is
6 pending; and

7 “(c) Are made without notice and opportunity for the agency and all parties to participate in
8 the communication.

9 “(4) The provisions of this section apply to any ex parte communication made directly or indi-
10 rectly to an administrative law judge, or to any agent of an administrative law judge, by:

11 “(a) A party;

12 “(b) A party’s representative or legal adviser;

13 “(c) Any other person who has a direct or indirect interest in the outcome of the proceeding;

14 “(d) Any other person with personal knowledge of the facts relevant to the proceeding; or

15 “(e) Any officer, employee or agent of *[the] an agency [that is using the administrative law judge*
16 *to conduct the hearing].*

17 “(5) The provisions of this section do not apply to:

18 “(a) Communications made to an administrative law judge by other administrative law judges;

19 **or**

20 “(b) Communications made to an administrative law judge by any person employed by the office
21 to assist the administrative law judge; *or*].

22 *“[(c) Communications made to an administrative law judge by an assistant attorney general if the*
23 *communications are made in response to a request from the administrative law judge and the assistant*
24 *attorney general is not advising the agency that is conducting the hearing.]*

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26 **“AGENCIES REQUIRED TO USE ADMINISTRATIVE LAW JUDGES**
27 **FROM OFFICE OF ADMINISTRATIVE HEARINGS**

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29 **“SECTION 10.** ORS 183.635 is amended to read:

30 “183.635. (1) Except as provided in this section, all agencies must use administrative law judges
31 assigned from the Office of Administrative Hearings established under ORS 183.605 to conduct con-
32 tested case hearings, without regard to whether those hearings are subject to the procedural re-
33 quirements for contested case hearings.

34 “(2) The following agencies need not use administrative law judges assigned from the office:

35 “(a) Attorney General.

36 “(b) Boards of stewards appointed by the Oregon Racing Commission.

37 “(c) Bureau of Labor and Industries and the Commissioner of the Bureau of Labor and Indus-
38 tries.

39 “(d) Department of Corrections.

40 “(e) Department of Education, State Board of Education and Superintendent of Public Instruc-
41 tion.

42 “(f) Department of Higher Education and institutions of higher education listed in ORS 352.002.

43 “(g) Department of Human Services for vocational rehabilitation services cases under 29 U.S.C.
44 722(c) and disability determination cases under 42 U.S.C. 405.

45 “(h) Department of Revenue.

- 1 “(i) Department of State Police.
- 2 “(j) Employment Appeals Board.
- 3 “(k) Employment Relations Board.
- 4 “(L) Energy Facility Siting Council.
- 5 “(m) Fair Dismissal Appeals Board.
- 6 “(n) Governor.
- 7 “(o) Land Conservation and Development Commission.
- 8 “(p) Land Use Board of Appeals.
- 9 “(q) Local government boundary commissions created pursuant to ORS 199.430.
- 10 “(r) Oregon Youth Authority.
- 11 “(s) Psychiatric Security Review Board.
- 12 “(t) Public Utility Commission.
- 13 “[*u*] *Secretary of State.*]
- 14 “[*v*] (u) State Accident Insurance Fund Corporation.
- 15 “[*w*] (v) State Apprenticeship and Training Council.
- 16 “[*x*] (w) State Board of Parole and Post-Prison Supervision.
- 17 “[*y*] (x) State Land Board.
- 18 “[*z*] (y) State Treasurer.
- 19 “[*aa*] (z) Wage and Hour Commission.

20 “(3) The Workers’ Compensation Board is exempt from using administrative law judges assigned
 21 from the office for any hearing conducted by the board under ORS chapters 147, 654 and 656. Except
 22 as specifically provided in this subsection, the Department of Consumer and Business Services must
 23 use administrative law judges assigned from the office only for contested cases arising out of the
 24 department’s powers and duties under:

- 25 “(a) ORS chapter 59;
- 26 “(b) ORS 200.005 to 200.075;
- 27 “(c) ORS chapter 455;
- 28 “(d) ORS chapter 674;
- 29 “(e) ORS chapters 706 to 716;
- 30 “(f) ORS chapter 717;
- 31 “(g) ORS chapters 722, 723, 725 and 726; and
- 32 “(h) ORS chapters 731, 732, 733, 734, 735, 737, 742, 743, 743A, 744, 746, 748 and 750.

33 “(4) Notwithstanding any other provision of law, in any proceeding in which an agency is re-
 34 quired to use an administrative law judge assigned from the office, an officer or employee of the
 35 agency may not conduct the hearing on behalf of the agency.

36 “(5) Notwithstanding any other provision of ORS 183.600 to 183.690, an agency is not required
 37 to use an administrative law judge assigned from the office if:

- 38 “(a) Federal law requires that a different administrative law judge or hearing officer be used;
- 39 or
- 40 “(b) Use of an administrative law judge from the office could result in a loss of federal funds.

41 “(6) Notwithstanding any other provision of this section, the Department of Environmental
 42 Quality must use administrative law judges assigned from the office only for contested case hearings
 43 conducted under the provisions of ORS 183.413 to 183.470.

44 “**SECTION 11. The amendments to ORS 183.635 by section 10 of this 2009 Act apply to all**
 45 **contested case hearings conducted by the Secretary of State on or after the effective date**

1 of this 2009 Act.

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“CAPTIONS

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5 **“SECTION 12. The unit captions used in this 2009 Act are provided only for the conven-**
6 **ience of the reader and do not become part of the statutory law of this state or express any**
7 **legislative intent in the enactment of this 2009 Act.**

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“EMERGENCY CLAUSE

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11 **“SECTION 13. This 2009 Act being necessary for the immediate preservation of the public**
12 **peace, health and safety, an emergency is declared to exist, and this 2009 Act takes effect**
13 **on its passage.”.**

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